Filed 4/7/09 In re B.C. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re B.C., a Person Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. M.C., Defendant and Appellant.	E045996 (Super.Ct.No. RIJ100893) OPINION

APPEAL from the Superior Court of Riverside County. Kenneth Fernandez, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Brent Riggs, under appointment by the Court of Appeal, for Defendant and Appellant.

Joe S. Rank, County Counsel, and Sophia H. Choi, Deputy County Counsel, for Plaintiff and Respondent.

Jacquelyn E. Gentry, under appointment by the Court of Appeal, for Minor.

Father appeals from the termination of his parental rights under Welfare and Institutions Code section 366.26[1] as to his daughter B.C. (minor), who was born in 1995. Father challenges the sufficiency of the evidence to support the order terminating his parental rights. He also argues the termination order should be reversed because he has a continuing and beneficial bond with minor and an exception to the termination of parental rights applies as set forth in section 366.26, subdivision (c)(1)(B)(i).

FACTUAL AND PROCEDURAL BACKGROUND

Father's appeal comes to us on a lengthy record. The family began receiving voluntary services more than nine years ago on or about May 24, 2000, after father reportedly "threatened to kill the family while handling a loaded gun." The original dependency petition was filed on February 15, 2001, and involved five children who were living in the household at the time. The two youngest children, minor, a girl born in 1995, and T.C., a boy born in 1997, were the biological children of mother and father. The other three children, two boys and a girl, were significantly older and belonged to mother from a previous relationship.[2] The petition alleged serious acts of domestic violence by father against mother, which placed the children at risk of physical and

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

[2] Our summary does not include background information on the other children, because the status of the dependency proceedings as to them is not relevant to the matters raised by father in the present appeal.

emotional harm. The petition further alleged that both mother and father had failed to actively participate in voluntary services.

All of the children were removed and placed with the maternal grandmother. The court ordered reunification services for both parents. The minor was briefly reunified with mother on June 26, 2002, but removed again shortly thereafter when father violated an order to stay outside the home. Father's reunification services were terminated on June 23, 2003, and minor was placed with the maternal grandmother, who was appointed as her legal guardian with reasonable visitation for the parents. The dependency proceedings were then concluded as to minor without a termination of parental rights.

On June 28, 2005, father filed a petition pursuant to section 388 asking the court to terminate the legal guardianship as to minor, reinstate dependency, and place minor with him because the maternal grandmother was terminally ill and because he had resolved issues relating to minor's detention. To support the petition, father submitted certificates showing he completed parenting and anger management classes.

On July 13, 2005, after the maternal grandmother was deceased, DPSS filed a new dependency petition under section 300, subdivisions (b) and (g), alleging minor had been left with no provisions for care and support. Although the court reinstated the dependency proceedings as to minor on August 3, 2005, it did not place minor with father. Mother's oldest daughter, M.C., who was now an adult, inherited the maternal grandmother's home, and minor went to live there with M.C. and M.C.'s husband. Father was offered reunification services and was ordered to participate in counseling and education programs. He was allowed overnight and weekend visits as long as he was

complying with his case plan. The court's minute order of August 3, 2005, also states, "If the visits go well, court authorizes placement of [minor] with father . . . ."

On November 13, 2005, father remarried and established a home with his wife and her four children from a previous relationship. Father's new home was given a positive assessment by DPSS, and minor began overnight visits there. In a six-month review report dated January 20, 2006, DPSS reported "father has made a commendable effort in cooperating with [DPSS] and meeting case plan objectives." DPSS recommended returning minor to father's custody "subject to the supervision" of DPSS.

On December 15, 2005, father advised he had reenlisted in the military and was being deployed to Iraq for a year. On March 27, 2006, the court ordered reunification services stayed during father's deployment and authorized DPSS to place minor with father on his return. While father was in Iraq and after his return, minor continued to live with her older, half-sister M.C. and M.C.'s husband, who had both expressed an interest in adopting minor if she was not reunified with her father. At the 12-month review hearing on September 25, 2006, while father was still in Iraq, the court concluded father's progress on the case plan was "adequate but incomplete."

In the 18-month review report filed on March 13, 2007, after father's return from Iraq, DPSS changed its recommendation. DPSS recommended the termination of reunification services. At the 18-month review hearing on April 23, 2007, the court

terminated reunification services to father and set a section 366.26 hearing.[3] On April 17, 2008, the court held the final section 366.26 hearing. Father objected to the termination of his parental rights and requested legal guardianship as the permanent plan. The court terminated the parental rights of both mother and father as to minor, and concluded adoption was in minor's best interest. The present appeal involves only father and minor. Mother is not involved in this appeal.

DISCUSSION

Sufficiency of the Evidence

Father believes the court "implicitly" found him fit to parent minor on March 27, 2006, at the six-month review hearing but later reversed this finding without sufficient evidence of unfitness. He believes there is no evidence during the 12- and 18-month review periods which adversely reflected on his fitness to parent minor. As a result, he contends his parental rights were terminated without clear and convincing evidence he was an unfit parent. We disagree. Father's argument ignores too much of the record.

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[3] "An order setting a section 366.26 hearing is not appealable; rather review of such an order may be had only by filing a petition for an extraordinary writ." (*In re Harmony B.* (2005) 125 Cal.App.4th 831, 838.) The juvenile court must give notice of the writ requirement orally to all parties present at the setting hearing and by first class mail to all parties not present. (§ 366.26, subd. (*l*)(3)(A); Cal. Rules of Court, rules 5.585(e), 5.600(b), 5.695(f)(18).) "When notice is not given, the parents' claims of error occurring at the setting hearing may be addressed on review from the disposition following the section 366.26 hearing." (*In re Harmony B.*, at p. 838.) The notice must be mailed within 24 hours of the hearing to "the last known address" of the party. (Cal. Rules of Court, rules 5.585(e)(1), 5.600(b)(1), 5.695(f)(18)(A).) Respondent concedes father may raise this issue because he was given inadequate notice of the need to file a petition for extraordinary writ review in order to preserve the right to appeal. We agree. The record indicates father was not provided with timely notice at his correct address.

For a child over the age of three years, reunification services are usually limited to 12 months after the date the child enters foster care. (§ 361.5, subd. (a)(1).) "[C]ourt-ordered services may be extended up to a maximum time period not to exceed 18 months . . . if it can be shown . . . that the permanent plan for the child is that he or she will be returned and safely maintained in the home within the extended time period." (§ 361.5, subd. (a)(3).) "[T]he juvenile court has the discretion to terminate the reunification services of a parent at any time after it has ordered them, depending on the circumstances presented." (*In re Aryanna C.* (2005) 132 Cal.App.4th 1234, 1242.) "The failure of the parent or legal guardian to participate regularly and make substantive progress in court-ordered treatment programs shall be prima facie evidence that return would be detrimental." (§§ 366.21, subds. (e), (f), 366.22, subd. (a).) "In making its determination, the court shall review and consider the social worker's report and recommendations and . . . shall consider the efforts or progress, or both, demonstrated by the parent or legal guardian and the extent to which he or she availed himself or herself of services provided . . . ." (§§ 366.21, subds. (e), (f), 366.22, subd. (a).)

At the six-, 12-, and 18-month review hearings, the court must order the return of the child to the parents unless the social worker proves by a preponderance of evidence "that the return of the child to his or her parent or legal guardian would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child." (§§ 366.21, subds. (e), (f), 366.22, subd. (a).) "During the final period, which runs from the 12-month review hearing to the 18-month review hearing (§ 366.22), services are available only if the juvenile court finds specifically that the parent has

'consistently and regularly contacted and visited with the child,' made 'significant progress' on the problems that led to removal, and 'demonstrated the capacity and ability both to complete the objectives of his or her treatment plan and to provide for the child's safety, protection, physical and emotional well-being, and special needs.' (§ 366.21, subd. (g)(1)(A)-(C).)" (*Tonya M. v. Superior Court* (2007) 42 Cal.4th 836, 845.) The 18-month review hearing "marks a critical turning point in the proceedings." (*David B. v. Superior Court* (2006) 140 Cal.App.4th 772, 778.) If reunification services have been terminated at the time of the 18-month review hearing, the court must set a section 366.26 permanency hearing unless it finds by clear and convincing evidence that doing so is not in the child's best interest. At this time, "termination of parental rights becomes the preferred placement option. (§ 366.26, subd. (b)(1)-(4).)" (*David B. v. Superior Court*, at p. 778.)

Before a state completely and irrevocably terminates parental rights, due process requires the state to support its allegations of parental unfitness by clear and convincing evidence. (*In re P.A.* (2007) 155 Cal.App.4th 1197, 1211.) We review an order denying reunification services or terminating parental rights for substantial evidence. (*In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1154.) " 'In making this determination, we must decide if the evidence is reasonable, credible, and of solid value, such that a reasonable trier of fact could find the court's order was proper based on clear and convincing evidence. [Citation.]' " (*In re Harmony B.*, *supra*, 125 Cal.App.4th at pp. 839-840.) "It is not our function, of course, to reweigh the evidence or express our independent

judgment on the issues before the trial court." (*In re Jasmon O.* (1994) 8 Cal.4th 398, 423.)

As noted above, father was provided with reunification services during the initial dependency proceedings but was not successful, and those services were terminated on June 23, 2003. At the jurisdictional hearing held on August 3, 2005, in the instant dependency proceeding, the court ordered continued placement outside father's home based on (1) a "substantial danger" to minor's safety and physical and emotional well-being, and (2) "unsatisfactory" progress by father in alleviating or mitigating the causes necessitating placement outside the home. Father does not contest these facts.

In this subsequent proceeding, the court ordered a second set of family reunification services to father to "not exceed the statutory time line of 12 months" and approved a case plan. Father's case plan required him to: (1) "comply with all orders of the court"; (2) "[e]xpress anger appropriately" and "not act negatively" based on impulses; (3) show knowledge of "age appropriate behavior" for minor; (4) show ability "to supervise, guide, and correct" minor "at home, school, and in the community"; (5) "[p]ay attention to and monitor" minor's "health, safety, and well being"; (6) "[b]e nurturing and supportive" during visits with minor; (7) "consistently, appropriately and adequately parent" minor; (8) show "ability to understand" minor's "feelings and give emotional support"; (9) participate in individual and family counseling as directed; and (10) "complete an age appropriate parenting class." In addition, the court authorized "overnight/weekend visits" with minor based "on a suitable home evaluation" and as long as father was "successfully participating in his case plan" and abiding by "all reasonable

directives of the social worker." "If the visits go well," the court further authorized "placement of [minor] with father on the same terms and conditions stated above."

In a report filed January 20, 2006, which was prepared in anticipation of the six-month review, the social worker reported father "made a commendable effort in cooperating with [DPSS] and meeting case plan objectives during this reporting period." The report stated there had been "significant changes" in father's circumstances. During the reporting period, he married a woman who had several children from a previous relationship. The social worker visited their joint home and conducted a background check on father's new wife. Father and his wife were excited about having minor join their household. Father reenlisted in the military and was scheduled for deployment to Iraq on January 23, 2006. Minor had mixed feelings about living in father's home because of these changes and did not want to live in father's home while he was in Iraq. Father agreed minor could remain with M.C. while he was in Iraq. The social worker recommended minor "be reunified with her father and that the father receives Family Maintenance Services."

At the six-month review hearing held March 27, 2006, the court concluded father's progress in alleviating the causes necessitating placement was "satisfactory." The court also concluded father made "substantive progress" with the case plan. However, at this time father was deployed to Iraq so the court found it was "inappropriate to return the child to the father's home at this time." Family reunification services were continued and DPSS was authorized to return minor to father "upon his return from Iraq."

In a report filed September 14, 2006, which was prepared in anticipation of the 12-month review, the social worker reported father was due home from Iraq in the first week of October 2006. While father was away, minor had regular visits with her new stepmother and kept in close contact with father through written correspondence, telephone, and over the Internet. The social worker recommended placement with father upon his return home under a family maintenance plan. At the 12-month review hearing held September 25, 2006, the court concluded the extent of father's progress in alleviating the causes necessitating placement was "adequate but incomplete." Reunification services were continued. "Return home" was designated as the "permanent plan" to be finalized by March 26, 2007. DPSS was authorized to place minor with father upon his return home from Iraq conditioned on a "suitable home evaluation" and "the recommendation of the therapist."

By the time the next status review report was filed on March 13, 2007, in anticipation of the 18-month review hearing, there were dramatic changes in the relevant circumstances. Father returned home in early October 2006 and a liberal visitation schedule was established. However, minor regularly reported fighting between father and stepmother, poor relations with the other children in father's home, and a disagreement with the stepmother that resulted in minor being returned home during one of the visits. On January 29, 2007, minor complained that father "doesn't spend time with me."

Later, minor said visits with father had improved, but a number of other troublesome circumstances came to the social worker's attention during this final

reporting period that resulted in a recommendation for the termination of family reunification services and parental rights. First, on January 27, 2007, father was arrested and charged with felony counts of burglary and petty theft. Father pled not guilty to the charges and was released on his own recognizance. Although the charges were unresolved at the time the report was written, the social worker attached police reports for consideration by the court, and the information contained therein was compelling.

Second, the social worker reported father was unable to effectively participate in conjoint counseling sessions with minor, had made poor parental choices, had inappropriate conversations with minor, undermined the authority of other adult caregivers, and frequently argued with his new spouse in front of minor. While visiting father, most of minor's care was provided by the stepmother rather than father, and father had not shown he could independently care for his daughter. His new marriage was showing signs of instability, and his new wife had "repeatedly" threatened to leave the relationship. In addition, father informed DPSS he received orders recalling him to active military duty in Iraq beginning March 26, 2007. Therefore, based on "poor progress" on the case plan, the social worker concluded that "a continuation of services would only delay the stability and permanency that the child craves," and result in "considerable risk" to minor.

In an addendum report filed on March 12, 2008, the social worker stated father had maintained contact with minor but "has not met any of her physical and emotional needs." As a result, the social worker concluded "nothing has changed to indicate that caring for his daughter is his priority." At this time, the social worker recommended the

termination of reunification services and parental rights and the implementation of a permanent plan of adoption by minor's caretakers.

Based on all of these developments, the trial court could reasonably conclude at the 18-month review hearing on April 23, 2007, that there was clear and convincing evidence of unfitness. Father had had two separate opportunities at reunification but was unable to successfully complete a case plan or to progress from liberal visitation to reunification with family maintenance services. At this late date in the proceedings, father had not demonstrated an ability to complete the objectives of the case plan or to provide for minor's physical and emotional well-being and special need for close supervision and guidance. As a result, we conclude the trial court appropriately terminated father's reunification services and parental rights based on clear and convincing evidence of unfitness.

Beneficial Relationship Exception

Father argues we should reverse the juvenile court's termination order under the beneficial relationship exception to the termination of parental rights set forth in section 366.26, subdivision (c)(1)(B)(i). He believes the exception applies because he has maintained regular contact and visitation with minor, and minor would benefit by continuing the parental relationship with him. We disagree. Once again, father's argument ignores too much of the record.

In pertinent part, the exception set forth at section 366.26, subdivision (c)(1), provides as follows: "[T]he court shall terminate parental rights unless either of the following applies: [¶] . . . [¶] (B) The court finds a compelling reason for determining

that termination would be detrimental to the child due to one or more of the following circumstances: [¶] (i) The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship."

" 'Once reunification services are ordered terminated, the focus shifts to the needs of the child for permanency and stability.' [Citation.]" (*In re Celine R.* (2003) 31 Cal.4th 45, 52.) "The statutory exceptions merely permit the court, in *exceptional circumstances* [citation], to choose an option other than the norm, which remains adoption." (*Id.* at p. 53.) "The parent has the burden to show that the statutory exception applies." (*In re Derek W.* (1999) 73 Cal.App.4th 823, 826.) To meet this burden, it is not enough for the parent to show he or she occupies "a pleasant place" in the child's life (*In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324) or to show "frequent and loving contact." (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418.) The exception does not apply "when a parent has frequent contact with but does not stand in a parental role to the child." (*Id.* at p. 1420.)

For the exception to apply, the parent must show "the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for

adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.)

To support his argument that the beneficial relationship exception applies in his case, father relies on the case entitled *In re S.B.* (2008) 164 Cal.App.4th 289, 296-301 (*S.B.*). Based on the particular facts of the case, the appellate court in *S.B.* concluded the trial court should have found the beneficial relationship exception applied. (*Id*. at p. 301.) In addition to a beneficial bond accompanied by "consistent contact and visitation," the father in *S.B.* had been the child's "primary caregiver" prior to the dependency and had demonstrated "constant" devotion to his child "by his full compliance with his case plan and continued efforts to regain his physical and psychological health." (*Id*. at p. 300.) There was also evidence in the record indicating the father occupied a parental role in the child's life, and the child had a "significant, positive, emotional relationship with her father" and would be "greatly harmed" if the relationship was severed. (*Id*. at pp. 300-301.) These facts are easily distinguished from those at issue here.

When she was removed from her parents' home in 2001, minor was five years old. She is now about 13 years old and has not lived with father for about eight years—more than half of her life. During most of this time period, minor has been living with her older half sister, M.C., in the maternal grandmother's home. She is now a teenager, and according to DPSS, she needs close supervision and guidance. At the time of the section 366.26 hearing, M.C. and her husband were able to meet all of minor's medical, educational, physical, and emotional needs in a safe, stable home environment and had

been doing so for quite some time. Although minor at times had conflicting feelings and wanted to live with father, the social worker regularly reported she was thriving and doing well in this environment. She reportedly had developed a "strong and enduring attachment" to M.C. and her husband, and they were committed to adopting minor to ensure she develops into a happy and productive adult, and minor was in favor of the adoption. The record indicates these caretakers have at all relevant times occupied the primary parental role for minor.

It is undisputed that father has had a continuing bond with minor. He has taken advantage of visitation on a consistent and frequent basis and has maintained contact with minor throughout the dependency proceedings while she was living with other relatives. To his credit, he also kept in close contact with minor while deployed to Iraq. However, this frequent and loving contact is not enough for father to meet his burden of showing minor would suffer detriment as a result of the termination of father's parental rights. Nor has father met his burden of showing he stands in a parental role with minor, so that the beneficial relationship he shares with her outweighs the benefits she would gain from the permanency and stability of an adoption. As outlined more fully above, father was unable to establish himself in a positive parental role for any significant period of time despite continuing contact and reunification services on two separate occasions. Therefore, the balance of factors weighs in favor of the termination of parental rights. We therefore conclude the trial court properly determined none of the exceptions in

section 366.26, subdivision (c), applied and termination of parental rights "would not be detrimental" to minor.[4]

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

MILLER
J.

[4] We also note for the record that on December 17, 2008, appellate counsel for minor filed a letter brief agreeing with the arguments presented by DPSS and requesting that we affirm the judgment.